NO. 95-789

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1995

STATE OF CALIFORNIA, Division of Labor Standards Enforcement, Division of Apprenticeship Standards, Department of Industrial Relations, County of Sonoma,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., Inc., Manuel J. Arceo, dba Sound Systems Media,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF WASHINGTON, DELAWARE, KENTUCKY, MARYLAND, MASSACHUSETTS, MONTANA, NEVADA, NEW JERSEY, OREGON and the COMMONWEALTH OF PENNSYLVANIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

LYNN D.W. HENDRICKSON
**JEFF B. KRAY*
Assistant Attorneys General

**Counsel of Record*
P.O. Box 40121
Olympia, Washington 98504-0121
(360) 459-6571

[Additional counsel on inside cover]

M. JANE BRADY
Attorney General of Delaware
820 N. French Street
Wilmington DE 19801
(302) 577-3047

A. B. CHANDLER III
Attorney General of Kentucky
State Capitol, Room 116
Frankfort KY 40601
(502) 564-7600

J. JOSEPH CURRAN JR.
Attorney General of Maryland
200 Saint Paul Place
Baltimore MD 21202-2202
(410) 576-6336

SCOTT HARSHBARGER
Attorney General of Massachusetts
One Ashburton Place
Boston MA 02108-1698
(617) 727-2200

JOSEPH P. MAZUREK
Attorney General of Montana
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

FRANKIE SUE DEL PAPA
Attorney General of Nevada
198 South Carson Street
Carson City NV 89710
(702) 687-4488

DEBORAH T. PORITZ
Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, CN 080
Trenton NJ 08625
(609) 292-8567

THEODORE R. KULONGOSKI
Attorney General of Oregon
100 Justice Building
Salem OR 97310
(503) 378-4402

THOMAS W. CORBETT, JR.
Attorney General of the Commonwealth of Pennsylvania
16th Fl., Strawberry Square
Harrisburg PA 17120
(717) 787-1100

QUESTION PRESENTED

Whether Congress intended, in enacting the Employee Retirement Income Security Act, to preempt states' traditional regulation of wages, apprenticeship and state-funded public works construction when expressed in a state prevailing wage law that permits contractors' payment of lower apprentice specific wages to apprentices duly registered in programs approved as meeting federal standards?

TABLE OF CONTENTS

CASES

FEDERAL STATUTES

STATE STATUTES AND REGULATIONS

I. INTEREST OF THE AMICI

Washington and the other named States submit this brief as *amici curiae* in support of petitioner, State of California, and urge this Court to grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment of that court in *Dillingham v. State of California*, 57 F.3d 712 (9th Cir. 1995). The amici States fall within the jurisdictional boundaries of several of the federal circuits. Because this brief is submitted on behalf of Washington, Delaware, Kentucky, Maryland, Massachusetts, Montana, Nevada, New Jersey, Oregon and the Commonwealth of Pennsylvania, by their attorneys general, consent to its filing is not required. SUP. CT. R. 37.5.

In 1937, Congress enacted the National Apprenticeship Act, 29 U.S.C. § 50 (Fitzgerald Act), for the "...purposes of protecting apprentices through the establishment of minimum labor standards, promoting apprenticeship as a system of training skilled workers and encouraging the federal government to cooperate with state agencies in formulating apprentice standards." *Joint Apprenticeship and Training Council of Local 363 v. New York State Dep't. of Labor*, 984 F.2d 589, 591 (2nd Cir. 1993) (*citing 29 U.S.C. § 50-50b (1988 & Supp. III 1992) and statements of Representative Fitzgerald in the Congressional Record*).

Federal regulations permit state agencies to apply to the United States Secretary of Labor for federal recognition as a State Apprenticeship Agency or Council ("SAC"). 29 C.F.R. § 29.12 (1992). If the state agency's standards and procedures are in conformity with federal standards, a SAC becomes federally approved and empowered to establish, for federal as well as state purposes, requirements for

apprenticeship programs as well as procedures by which to determine issues of registration. *Local 363 v. New York State Dept. of Labor*, 829 F.Supp 101, 103 (S.D.N.Y. 1993).

The amici states, as federally recognized SACs, are authorized to determine whether apprenticeship programs comply with state and federal standards pursuant to state law and the Fitzgerald Act. 29 U.S.C. §§ 50-50b (1988 & Supp. III 1992). The establishment of amici state apprenticeship programs predate the 1974 enactment of ERISA.[1] Furthermore, in at least Maryland and Washington, the prevailing wage provisions permitting the payment of lower apprentice specific wages to apprentices duly registered in approved programs, also predate the 1974 enactment of ERISA.[2]

The interests of several amici states are heightened because they are parties to litigation pending in other courts in which similar issues have been raised. Pennsylvania state officials are parties to a case presently pending in the Court of Appeals for the Third Circuit.[3] The State of

---

[1] Delaware, DEL. CODE ANN., tit. 19, §§ 201-03 (Michie 1995) (enacted in 1963); Kentucky, KY. REV. STAT. ANN. § 343.020 (Baldwin 1995) (enacted in 1942); Maryland, MD. CODE ANN., LAB. & EMPL. ART., § 11-405 (Michie 1995) (enacted in 1957); Massachusetts, MASS. GEN. LAWS ANN. ch. 23 § 11E (West 1995) (enacted in 1941); Montana, MONT. CODE ANN. § 39-6-101 (1993) (enacted in 1941); Nevada, NEV. REV. STAT. § 53.610.020 (1993) (enacted in 1939); New Jersey, N.J. REV. STAT. ANN. § 34:1A-36 (West 1995) (enacted in 1953); Oregon, OR. REV. STAT. § 660.120 (1993) (enacted in 1955); Pennsylvania, 43 PA. CONS. STAT § 90.3 (West 1995) (enacted in 1961); Washington, WASH. REV. CODE § 49.04.010 (1994) (enacted in 1941).

[2] WASH. REV. CODE § 39.12.021 (1994) (enacted in 1963); *Habron v. Epstein*, 412 F. Supp. 256, 258 (D.Md. 1976).

[3] *Ferguson Electric Company, Inc. v. Foley, et al.*, Nos. 95-7454 and 95-7464.

Washington is a party to two cases presently before the Court of Appeals for the Ninth Circuit.[4] Washington has encouraged the Court of Appeals for the Ninth Circuit to follow the analysis of *New York State Conference of Blue Cross & Blue Shield Plans, et. al. v. Travelers Insurance Company*, 514 U.S. ---, 115 S.Ct. 1671 (April 26, 1995) in finding no ERISA preemption where the purpose of state regulation is consistent with the purpose of any federal law at issue.

Review is necessary to protect and preserve the respective prevailing wage laws of the amici states represented herein and the long-standing cooperative state/federal effort in the formulation, promotion and enforcement of quality apprenticeship programs and standards. Cooperative state/federal regulation of apprenticeship is seriously undermined by application of the statutory analysis of ERISA provisions utilized by the Court of Appeals for the Ninth Circuit in *Dillingham*.

---

[4] In *Inland Pacific Chapter of Associated General Contractors of America, v. Joseph A. Dear, Director, Dept. Labor & Industries of the State of Washington*, No. 93-36022, various contractor groups have challenged the Washington prevailing wage statute that requires payment of prevailing wages to employees in apprenticeship programs that had not received state approval but allows the payment of lower wages to employees participating in state approved programs. In *Inland Pacific Chapter of Associated Builders and Contractors of America, et.al. v. Joseph A. Dear, Director, Dept. Labor & Industries of the State of Washington the State, et.al*, Nos. 93-35568 and 93-35602, various contractor groups have challenged the authority of state regulations related to state approval of apprenticeship programs.

II. ARGUMENT

A. The Ninth Circuit analysis severs the traditional state and federal relationship on apprenticeship matters, which historically preexisted the enactment of ERISA.

The amici states, following the Fitzgerald Act's commitment to the welfare of apprentices and desire to foster cooperation with states, enacted complimentary state apprenticeship councils or programs which reflected the existence and the need to adopt or harmonize apprenticeship standards with the policies of the United States Department of Labor.[5]

If allowed to stand *Dillingham* will seriously undermine, if not eliminate, the state incentive to create and sustain quality apprenticeship programs that meet uniform quality standards of duration, curriculum, safety and supervision. Bona fide apprenticeship programs depend on public works to provide thousands of on-the-job training hours needed to produce a trained journey level employee. In *Electrical Joint Apprenticeship Committee v. MacDonald, 949 F.2d 270 (9th Cir. 1991)*, the Court of Appeals for the Ninth Circuit observed that in the building trades "[i]n order for such an apprenticeship program to work, it is essential that the employer be able to pay lesser wages to apprentices while they are in training. Prevailing wage statutes for public works thus present a significant

---

[5] DEL. CODE ANN., tit. 19, §§ 201-03 (Michie 1995); KY. REV. STAT. ANN. § 343.020 (Baldwin 1995); MD. CODE ANN., LAB. & EMPL. ART., § 11-405 (Michie 1995); MASS. GEN. LAWS ANN. ch. 23 § 11G (West 1995); MONT. CODE ANN. § 39-6-101 (1993); NEV. REV. STAT. § 53.610.020 (1993); N.J. REV. STAT. ANN. § 34:1A-36 (West 1988); OR. REV. STAT. § 660.120 (1993); 43 PA. CONS. STAT § 90.1 (West 1995); WASH. REV. CODE § 49.04.030 (1994).

obstacle, unless apprenticeship programs are exempted." *Id.*, at 274.

The *Dillingham* decision will also provide an economic disincentive for contractors to devote resources to the provision of necessary, comprehensive apprenticeship agreements. No longer will a contractor have to demonstrate that an individual on a job site is actually in a bona fide apprenticeship program in order to receive a reduction in the prevailing wage rate. Mere classification of a laborer as an "apprentice" may suffice. States desiring completion of quality public works projects will likely react by removing the sub-journey wage rate all together.

B. The decision in *Dillingham*, fails to adhere to, let alone acknowledge, the narrowing of ERISA's scope of preemption evidenced by the inquiry into Congressional intent in the recent *Travelers* case.

California's prevailing wage law, Cal. Lab. Code §1777.5, permits contractors to pay lower apprentice specific wages to apprentices duly registered in programs approved as meeting federal standards. *Dillingham*, however, held that the application of a state's prevailing wage law to allow payment of lower apprentice specific wages to apprentices duly registered in programs approved as meeting federal standards was preempted by ERISA. 57 F.3d at 715. The court assumed that the provision allowing a contractor to pay a lower apprentice specific wage "... has the effect, and possibly the aim of encouraging participation in state approved ERISA plans while discouraging participation in unapproved ERISA plans." *Id.*, at 719. This indirect effect was held sufficient to trigger ERISA preemption. *Id.*

The *Dillingham* decision is contrary to, and fails to recognize, this Court's recent holding that state laws which authorize an indirect source of administrative cost or result in an indirect source of merely economic influence on administrative decisions do not suffice to trigger ERISA preemption. *New York State Conference of Blue Cross & Blue Shield Plans, et. al. v. Travelers Insurance Company*, 514 US, at ____, 115 S.Ct. 1671, (1995). In *Travelers*, the Court acknowledged the dissonance created by finding ERISA preemption of preexisting state regulations. The Court noted that the decision of the Court of Appeals was "...an unsettling result and all the more startling because several States, including New York regulated hospital charges to one degree or another at the time ERISA was passed...(*citations to state statutes omitted*) ... [a]nd yet there is not so much as a hint in ERISA's legislative history or anywhere else that Congress intended to squelch these state efforts." *Id.*, at 1681.

The goal of Congress in enacting ERISA was to ensure the uniformity of employee benefit plans so "that employers would not face conflicting or inconsistent state and local regulation of employee benefits plans." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Neither California Labor Law §1777.5, or the authority to regulate apprenticeship in the amici states, does any harm to this goal.

Without review of the *Dillingham* decision, the Ninth Circuit will continue to disregard this judicial direction of statutory analysis and automatically find ERISA preempts state prevailing wage laws. The Petitioners' prediction that the Ninth Circuit will continue to follow the analysis set forth in *Dillingham* has become verity. On October 17, 1995, one month after it heard argument, the Ninth Circuit decided, in *ABC National Line*

Erection Apprenticeship Training Trust v. Aubry, Jr., 68 F.3d 343, 346 (9th Cir. 1995), that an Apprenticeship Training Trust fund, which was not "state approved" had standing to challenge California's prevailing wage laws and sub-journey wage rate provisions on the basis of preemption by ERISA. Reliance on the *Dillingham* result was unquestioned and reference to the *Travelers* decision was cursory. *Id.*, at 346-7.

C. Conflict Exists Within the Circuits On Whether Congress, Through the Enactment of ERISA, Intended To Preempt States' Traditional Regulation of Wages, Apprenticeship and State-funded Public Works Construction.

Petitioner has effectively identified the conflict between the Eighth Circuit decision in *Minnesota Chapter ABC v. Minnesota*, 47 F.3d 975 (8th Cir. 1995) and the *Dillingham* decision. Only the *Minnesota Chapter ABC* decision recognizes the empowerment that flows to "both the Bureau (of Apprenticeship and Training) and approved state agencies or councils to approve apprenticeship programs for federal purposes." 47 F.3d at 980; 29 C.F.R. § 29.3 (1994). Unless the Supreme Court resolves the conflict, contractors, apprentices, and state and local public agencies in different states with similar state prevailing wage and apprenticeship laws will face uncertainty and conflicting directives concerning the use of apprentices on public works projects.

III. CONCLUSION

Amici Curiae respectfully request that this Court grant certiorari so that the method of statutory interpretation and the unintended consequences of the *Dillingham* decision are reviewed and ultimately avoided. Therefore, this Court should grant California's Petition for Writ of Certiorari.

DATED this 19th day of January, 1996.

Respectfully submitted,

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

LYNN D.W. HENDRICKSON
**JEFF B. KRAY*
Assistant Attorneys General

**Counsel of Record*
P.O. Box 40121
Olympia, Washington 98504-0121.
(360) 459-6571